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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-966

AMERICAN FOREIGN STEAMSHIP COMPANY,
a Corporation,

Petitioner,

v.

LILLIAN M. MATISE, as personal representative
of GRANVILLE C. MATISE, deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Did the Court of Appeal, with the record which was before it, properly rule that the illegal withholding of wages which it found to have occurred in the present case was done without sufficient cause to avoid the TIT. 46 U.S.C., Section 596 penalty?

2. After it has been judicially determined that wages were withheld in violation of law and that the double-wage penalty of Section 596 is applicable, do trial judges have the power, case by case, to reduce the penalty which the statute prescribes for such withholding?

STATEMENT OF THE CASE

The seaman respondent neglected his duties as a crewmember in the petitioner's vessel. As punishment he was fined $114.75 of his earned wages which the employer legally retains for its own purposes today. (Wage Voucher, App. p.5) Respondent was then involuntarily terminated in Saigon. The wages remaining to him after all legal withholdings, including the aforesaid fines, had been deducted, amounted to $628.45. The respondent has never challenged the master's right either to assess the aforesaid fines or to fire him and he admitted the legality of both those acts in his Complaint.

It is indisputable that at all times relevant to this action, the vessel owed a legal duty to the Government of South Vietnam to remove from that jurisdiction all persons it had brought there. This duty of removal applied to all passengers, all crewmembers, and even stowaways. It applied to the respondent. The duty was inescapable and it was enforceable by penalties of considerable severity. As a practical matter, the duty required the *repatriation* of all persons brought there who were not carried out again by the vessel, for the reason that the immigration departments

of all governments impose the same obligations and merely shifting a United States alien from one foreign jurisdiction to another would accomplish nothing.

The vessel satisfied the foregoing requirement, insofar as the respondent was concerned, by having the respondent flown back to the United States.

When the shipowner paid the respondent his earned wages in San Francisco, it deducted from those wages the amount of $510.00. This was stated to be for the purpose of recouping the money it had spent to transport the respondent from Saigon to the United States. (Wage Voucher, App. p.5.)

The seaman did not learn of the illegal nature of this wage deduction for several months. He then employed present counsel, who promptly sent a written demand to the shipowner for the wages taken and for the double-wage penalty which had accrued to date. The accrued penalty at that time was $2,800.00 and the seaman offered to settle for half of it and his wages, a total sum of $1,910.00. (App. EX. A.)

This offer was rejected by the shipowner in a letter which seemed to indicate confusion concerning the law. (App. EX. B.) The seaman's counsel replied promptly, citing the leading Supreme Court case on wage withholding, and reaffirming the offer to settle for half the penalty. (App. EX. C.)

Three weeks later a lawyer in a New York firm wrote to seaman's counsel stating that he would be in contact after reviewing the file. (App. EX. D.) This was the last communication ever sent by the shipowner or its counsel until after suit had been filed.

One month later, when no contact had occurred, the seaman sent a reminder. (App. EX. E.)

After two more months of inaction by the shipowner, seaman's counsel sent an offer to settle all claims for $2,500.00. At this time the accrued penalty was $8,337.00. A period of 30 days was given in which to reply. (App. Ex. F.)

No response to this letter was ever received and after waiting several weeks past the prescribed time, the seaman filed suit on March 13, 1970, for $510.00 of his earned wages and the waiting-time penalty provided in *Section 596.*

At the trial it was held that the purchase of the ticket by the shipowner for the purpose of transporting the seaman from Saigon to the United States constituted payment of wages to the seaman. (App. p.9) The seaman's claims were dismissed.

The Ninth Circuit ruled that the deduction for repatriation expenses was not one of those permitted by the statutes and was therefore illegal. It ruled further that the deduction was without sufficient cause and that the double-wage penalty applied. The case was remanded for entry of judgment.

Back in the lower court, the seaman sought judgment for his wages and the penalty which had accrued to the date of the trial court's first decree. At this stage of the proceedings, the shipowner introduced for the first time the argument that the penalty should be "tailored," i.e., cut down by the trial judge to whatever amount accorded with his view of the equities.

The seaman contended that the issue was untimely, that there was no authority for "tailoring" in the Ninth Circuit, and that even in jurisdictions where it was permitted, the defense had to be raised in the answer and any evidence offered in support of it had to be

presented at the trial–not at a new trial following remand for judgment.

While that question was pending, the Court of Appeal handed down its opinion in *Escobar v. SS Washington Trader,* 503 F.2d 271 (9th Cir. 1974), in which it decisively rejected the "tailoring" theory for the Ninth Circuit and declared that the penalty is to be computed as prescribed by the statute, without reduction.

The trial court thereupon entered judgment for the wages, costs in both courts, and the statutory amount of the penalty. (App. p.46.)

The shipowner's appeal from that judgment was dismissed as frivolous by the Ninth Circuit. (App. p.48.) The petition to this Court followed.

ARGUMENT

First Question: Sufficient Cause

Section 596 provides that the double-wage penalty applies when the master or owner "refuses or neglects to make payment" within the time prescribed by statute "without sufficient cause."

It is important to note at the outset that the penalty for failure or refusal to make payment can result from two distinct and separate causes:

(a) From *delay only*–where no deduction is made–and the shipowner asserts no right to the seaman's wages.

(b) From *effecting an illegal deduction*–usually based on a claim of contract, equity, or discipline; in

this situation the shipowner claims title to the wages in question and refuses to pay them over to the seaman on that ground.

1. If the withholding is one that is permitted by law, that fact obviously constitutes sufficient cause for making it.

2. If the withholding is one based solely upon delay, the question of sufficient cause for the delay can properly be considered. *Collie v. Fergusson*, 281 U.S.52 (1930).

3. If the withholding results from a deduction forbidden by law–*that fact alone establishes the absence of sufficient cause for making it.* The controlling law is simple, concise, clear and unchanging. There is no excuse for violating it.

It would seem that this simple and sensible rule should be allowed to operate. It would surely come close to effectuating the Congressional intent underlying the law. However, over the years, it has been smothered under a vast mass of argument by shipowners' counsel, all seeking to establish "sufficient causes" for having illegally taken and retained seamen's wages.

The impetus for this rampant obfuscation is, of course, to avoid the penalty, but the inspiration for it derives from a single decision. In 1930 this Court handed down its decision in *Collie v. Fergusson, supra*. In that case the shipowner had failed to pay wages in timely fashion because it was insolvent and performance was impossible. The only factor involved was delay. However, the language used in that decision to excuse impossibility of performance has been recited countless times since then in attempts to justify a sweeping,

indiscriminate assortment of unconscionable wage seizures.

Ever since *Collie* (*supra*), the trend on the part of the courts when the *Section 596* penalty is sought, has been to recognize two separate factors, *illegality* and *absence of sufficient cause*. There has been no attempt to distinguish between illegality stemming from mere delay, and that resulting from illegally asserted claims of title to wages.

The opinion of the Ninth Circuit (App. p.10 et seq) discloses that the Court employed the usual reasoning outlined above and dealt separately with the two questions. (App. p.13, top.) The Court first established that the taking of wages in the present case resulted from a deduction that was illegal. (App. p.16.)

It then proceeded to decide the question of sufficient cause.

It is obvious from the record on appeal that the defendant exerted itself to place before the trial court every fact and argument which tended to justify its conduct. The wage retention was argued both as being *within the statutes* (an advance; actual payment "in kind") and also as being *justified* by exigencies beyond the control of the vessel and its owners–*sufficient cause*. To support its claim of sufficient cause, the shipowner presented arguments that the seaman consented to the taking; that the U.S. Coast Guard had authorized it; that the Vice Consul had approved it; that the ship had no alternatives to choose from and was compelled to withhold the wages; that foreign law (currency regulations) required, and thereby justified, the act; that the seaman had signed a release of his claims and this provided the necessary justification; and

numerous other arguments directed to showing that sufficient cause existed, even though the taking might be illegal. These were all before the Appellate Court to weigh and judge.

In addition to knowing the reasons relied on by the shipowner to support its claims of "sufficient cause," the Appellate Court knew precisely what the cause for the taking really was! The vessel's Wage Voucher declared it precisely.

It was clear from the record that none of the tangled and confusing facts concerning local conditions in Saigon had any actual relationship to the wage-withholding in question. The vessel did not pretend that it had paid the seaman off in Saigon. It admitted, and its Pay Voucher showed, that Matise was paid off in San Francisco, and *at that time*, the company withheld from his wages an amount equal to that which the master had earlier taken from the vessel's safe and paid to an airline in Saigon.[1]

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[1] That the entire Saigon episode was merely diverting window-dressing dreamed up in an attempt to show sufficient cause for the deduction is quite apparent. This Court can take judicial notice of the following facts: Saigon, at the time of this occurrence, was one of the busiest ports in the world for U.S. shipping. Hundreds of U.S. vessels and thousands of seamen visited there; of necessity, many were left behind for medical care and repatriation. Literally thousands of civilian workers for construction companies, government agencies, and the armed forces were living there, and some were daily using the airlines to arrive and depart. If Matise had fallen ill or suffered a serious accident, the vessel's duty to repatriate him could not have been questioned. That his repatriation could and would have been accomplished in a completely routine manner is hardly to be doubted.

The deduction in this instance was a clear case of recouping from a seaman's wages an expenditure which the vessel had made five days earlier in Saigon (which it claimed to be for the seaman's benefit, but which actually served the vessel's).

This kind of recouping is one of the precise abuses which the statutes were intended to prevent. It denies basic due process. The seaman had a right to be heard in defense of his wages. The taking was exactly the same as occurred under the general maritime law. The Appellate Court had full knowledge that the withholding violated the statutes and was "insufficient" in terms of *Section 596*. Its decision on this issue is reasoned and clear, supported by two independently-sufficient grounds.

Second Question: Judicial Modification of the Statutory Penalty – "Tailoring"

Since 1927 and probably earlier, a practice has developed among some courts to cut down the double-wage award from the amount which the statute prescribes. When this is done, it is always in the name of equity, on the ground that the seaman delayed in the adjudication of his claim and, by exercise of bad faith, caused the penalty to build up to an amount which the shipowner, even when found liable for the penalty, should not have to pay in full. The doctrine has been labelled "tailoring."

A conflict has developed between the circuits concerning the validity of this doctrine and some have refused to recognize it. An opinion which applies the

doctrine is *Dahl v. The SS Amigo*, 202 F.Supp. 890, 894 (S.D. Ala. 1962).

A thoroughly-reasoned opinion rejecting the doctrine is *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81 (1966).

The Ninth Circuit, in *Escobar v. SS Washington Trader*, 503 F.2d 271 (9th Cir. 1974) has decisively rejected it.

The Tailoring Doctrine is Invalid

The tailoring doctrine is based entirely upon the belief that the seaman, by his delay, can control the amount of the penalty. That this belief is completely false is shown below.

Shipowner Can Deposit Wages with Court

In 1922 the Ninth Circuit declared a rule of law which has been adopted in other circuits and which has apparently never been even criticized unfavorably.

This rule declares that *payment by the shipowner of the net wages claimed and the penalty accrued to date of payment will stop the running of the penalty*. The rule is stated in *Gerber v. Spencer*, 287 F. 886 (9th Cir. 1922). This has been the law since at least 1922 and is the law today.

It is also established law that a shipowner can pay the contested wages, including the penalty wages, into the court's registry instead of delivering them to the seaman, with the same effect.

It thus becomes crystal clear that *a shipowner can stop the penalty at any time that it chooses to do so!* The seaman is totally unable to keep the penalty running if the shipowner merely deposits the disputed wages. *The shipowner can make the deposit without risking any loss*–since the court will return to it all monies which have not been judicially determined to belong to the seaman. After an employer has deposited the wages and penalty, it can thereafter disregard the diligence or lack of it with which the seaman prosecutes his claim.

The entire body of opinion in support of the "tailoring" theory is founded on a misconception of the law.

Shipowner Can Seek Declaratory Judgment

In addition to the simple, inexpensive and complete remedy described above, another one lies ready for the shipowners' use. It has merely to seek a *declaratory judgment* establishing its rights in the matter. (FRCP, Section 2201.) By this means it can limit the penalty to the first few weeks of the dispute.

There is nothing which prevents the employer from using both remedies–thereby stopping the penalty at the outset and having the dispute adjudged shortly thereafter.

There is no basis in fact, law, or equity that justifies interference with the Congressional intent expressed in Section 596. As the Court stated in *Swain (supra)*:

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There is no basis in fact, law, or equity that justifies interference with the Congressional intent expressed in Section 596. As the Court stated in *Swain (supra)*:

> "After all, if sufficient cause for the deduction is found to be lacking, the shipowner or his agent has either been overtly culpable in reducing a seaman's wages, or significantly inattentive in his duties vis-a-vis the seaman's wage rights. As we view it, it is precisely the possibility that large penalties will accrue that should motivate a shipowner to exercise care in computing wages due a seaman. We think that this deterrent was what Congress had in mind in providing for a penalty in the form of inflexible liquidated damages."

There is nothing more to be said on this important question. The law is settled and clear. The disregard for it which underlies the entire concept of tailoring is as incredible as the lack of perception in the fable of "The Emperor's Clothes."

CONCLUSION

The general maritime law permitted a ship's master to assert claims against wages, decide them unilaterally, and enforce them against wages in his trust. The victim of a wrongful taking had the burden of seeking his remedy in the courts. In the circumstances that prevailed, masters were practically unrestrained.

Congress enacted statutes which were intended to end these abuses. They listed the only offenses and the only contract-based claims for which wages could be taken. All other misdeeds required some other form of punishment. All other claims were required to be adjudicated where the seaman could be heard and even if he lost, his wages could not be reached.

After the statutes had been enacted, many masters continued to withhold wages just as they had before. But a seaman could now bring suit to enforce his statutory right to be paid his full wages. The validity of the claims for which the wages had been taken was irrelevant.

Seamen's suits for withheld wages were made economically possible by the penalty created by *Section 596*. However, recovery of wages and the waiting-time penalty was difficult. Only one seaman's suit succeeded on the Pacific Coast during the last century. (*Gerber v. Spencer, supra.*)

Shipowners' counsel successfully complicated what was intended to be a simple and summary seamen's remedy to the point that made its use an unappealing, risky venture.

Legality and *sufficient cause* were developed into troublesome areas of proof that cast a pall of uncertainty over the entire process and made litigation costly and long.

The Supreme Court in *Isbrandtsen Co. v. Johnson*, 343 U.S. 779 (1952) cut through the legality question and made its determination simple and clear. If the deduction involved was not listed, it was not legal.

This improvement still left the *sufficient cause* question as uncertain and troublesome as it had been before. Shipowners succeeded in having the issue declared to be one of fact to be decided by a jury. (*Lewis v. Hudson Waterways*, 495 F.2d 604 (2nd Cir. 1974)). A seaman still finds the intended benefits of the protective statutes to be almost illusory.

It is respectfully suggested that clarification by this Court, at this time, of the *sufficient cause* issue will go far to make the Congressional remedy for illegal seizure of seamen's wages a practical one.

Where the failure or refusal to pay wages is shown to be the result of a taking by the shipowner, with claim of title in itself, proof that said taking was illegal should be taken as proof of lack of sufficient cause. Unquestionably, a taking of funds by a trustee, in a manner which violated both statutory and constitutional rights of its employee, is "in some sense arbitrary or willful."

Respectfully submitted,

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